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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AUBREY DRAKE GRAHAM,

Plaintiff,

v. 25 Civ. 399 (JAV)

UMG RECORDINGS, INC.,

ORAL ARGUMENT

Defendant.

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New York, N.Y.
June 30, 2025
2:00 p.m.

Before:

HON. JEANNETTE A. VARGAS,

District Judge

APPEARANCES

WILLKIE FARR & GALLAGHER LLP
Attorneys for Plaintiff
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NICHOLAS CROWELL
KATELIN EVERSON
JAMES HORNER

(Case called)

MR. GOTTLIEB: Good afternoon, your Honor. Mike Gottlieb, from Willkie Farr & Gallagher, on behalf of plaintiff. With me at counsel table are Brady Sullivan and Anna Gotfryd.

MR. RANSOM: Good afternoon, your Honor. Rollin Ransom, from Sidley Austin, on behalf of defendant UMG. And with me today from Sidley are Nicholas Crowell, Katelin Everson, and James Horner.

THE COURT: Good afternoon, everyone.

We are here today to hear oral argument on defendant UMG Recordings' motion to dismiss the complaint filed by Aubrey Graham, popularly known as Drake. So let me outline how I'd like to proceed this afternoon.

Since this is UMG's motion, they're going to argue first, and then I'll hear from plaintiff's counsel, and then I'll allow UMG to have a rebuttal. For the sake of the court reporter, I would appreciate if counsel would speak at the podium today.

I do want to let everyone know that I have reviewed the amended complaint, the documents that were the subject of the request for judicial notice, and the parties' memorandum of law. So you should assume in your arguments my familiarity with of those materials and the arguments of the parties.

To preview for you my specific concerns and what it

would be most helpful for the Court for you to focus on, there are a few issues that I would predominantly like to hear from the counsel on today:

The first of those is whether or not I can make a legal determination at this stage in the proceedings as to whether or not the statements challenged as defamatory in Kendrick Lamar's lyrics are fact or opinion;

Second, if it is appropriate for me to resolve that on a motion to dismiss, whether and to what extent I should consider the documents submitted by defendants in their request for judicial notice in making that determination; and

Finally, applying the New York *Steinhilber* factors, are the challenged statements fact or opinion within the meaning of New York defamation law and the New York State Constitution?

With that preview of the Court's particular concerns, counsel, you may proceed.

MR. RANSOM: Thank you very much, your Honor, and thank you for the guidance, which is helpful.

I will focus my comments on Drake's defamation claim, although I would like to address the other two claims as well, and I'll focus on our primary argument which is also the subject of the Court's questions, which is that the statements at issue constitute non-actionable opinion rather than statements of fact. And to frame it, including in light of the

Court's questions, I want to start with a critical observation, which is that under binding New York law, that issue, the fact versus opinion issue, is a question of law solely for the Court. It is solely for the Court to decide as an issue of law, which we believe makes it particularly suitable for a determination on a motion to dismiss, and we see——and I will address——a number of cases dismissing claims on this basis. And it is amazing to me that not once in Drake's 27-page brief does Drake acknowledge that this is, in fact, an issue of law for the Court rather than a factual issue to be determined by a jury.

THE COURT: Well, let me stop you there, because you are correct that there are a number of cases where courts have decided this on a motion to dismiss. The New York Court of Appeals in *Brian* is one such case. But then, subsequently, following *Brian*, New York Court of Appeals had *Davis v. Boeheim*, which was in the context of a motion to dismiss and relied quite heavily on the early procedural posture of that case in finding——or holding——that the standard that applied at a motion to dismiss stage was whether or not the communications, taken in their ordinary meaning and context, are susceptible to a defamatory connotation, and suggested that if they were, and that if they could be taken in such a light, then the motion to dismiss should not be granted and discovery should proceed, which strikes me as being somewhat in tension

with the Court's prior decision in *Brian*, which, as you have observed in your brief, did permit a motion to dismiss because it is an objective standard. It's a reasonable listener standard, a question of law, and applied a somewhat different articulation of the test as to would the reasonable listener have understood the allegedly defamatory comment as opinion versus fact.

So I would like you to address that tension between those two cases. How do I reconcile them when I have to apply New York law?

MR. RANSOM: Of course. Your Honor, two things about *Davis v. Boeheim*, the first, including the way the Court characterized it, the issue of whether a particular statement is susceptible to a defamatory connotation is a distinct element of the defamation claim from the question of whether it is fact or opinion. And I recognize that, on that issue——whether a statement is susceptible to a defamatory connotation——there are cases that suggest that where there's a dispute as to whether statements could have a defamatory connotation or not, might go to the jury. That is treated distinctly from fact versus opinion, and in fact, we see that distinction in *Goldfarb*, the case that Drake primarily relies upon and which, as we pointed out in our reply, they misapprehend on this point, because the Court considers separately and distinctly the question of defamatory

connotation, on the one hand, and fact versus opinion, on the other. And as to fact versus opinion, the Court expressly notes that that is a pure question of law.

The second observation——

THE COURT: That is true, but I do want to press back on your reading of *Davis*, because *Davis* also does consider the opinion versus fact distinction and says that they cannot state as, a matter of law, that the statements are pure opinion because there's a reasonable view of the claims that have been asserted in the complaint, and that the court has to take that reasonable view in light of the——in favor of the plaintiffs at the motion to dismiss stage and, therefore, decides not to dismiss it.

So, although, yes, they also discussed the defamatory context, there is a portion of that opinion that is focused on the opinion versus fact distinction, which is the one raised by the defendants in this motion.

MR. RANSOM: And I do think, in that respect, there's a slight conflation, even in *Davis*. That said, *Davis* continues to apply the *Steinhilber* test, including the consideration of the four——sometimes collapsed as three——elements of determining fact versus opinion. And I think what's, ultimately, critical about *Davis* gets to the Court's final question of those that it laid out, which is, is this fact versus opinion? And what was critical in *Davis* was the court's ultimate conclusion that the

nature of the statements in *Davis* strongly suggested that the speaker had undisclosed information underlying his statements that would lead a person to conclude that they were statements of fact.

And as you walk through the ultimate conclusion of *Davis*, in determining that it survived a motion to dismiss on the fact versus opinion issue, it was ultimately driven, I submit, in its entirety, by the Court's conclusion that there were multiple factors that would lead a listener to believe that the speaker there had undisclosed information unique to him that led him to make the statements that he did. That included his reference to the fact that there was an investigation at the university underlying his conclusion, that his statements came out before the results of that investigation were released, that he had held a position of authority at the university about which he could speak with authority and solemnity, and that the nature of his comments, presented for an article and discourse on the issue were such that they were not rhetorical hyperbole, they were not in extremist or other consequences that lead one to conclude that they are likely to be statements of opinion. So that was the ultimate conclusion reached by the Court, and we have none of that here——none of the context, none of the indicia that suggests a thoughtful statement of fact based upon some weighty investigation as to which the speaker is privileged.

And I'll address that in greater detail. But I think it's critical, even under *Davis*, which continues to articulate and apply the *Steinhilber* factors, to emphasize that context is key. In *Steinhilber*, here are the words: "Even apparent statements of fact may assume the characteristic of statements of opinion when made in public debate, heated labor dispute, or circumstances in which an audience may anticipate the use of epithets, fiery rhetoric, or hyperbole." *Steinhilber* was 40 years before its time. Epithets, fiery rhetoric, or hyperbole——it might as well have said "statements in a rap battle." And even *Steinhilber* and the subsequent cases, including *Davis*, and as exemplified in *Davis*, recognize that that contextual assessment of the context in which the statements are made often, ultimately, determines whether one would perceive these as fact versus opinion. And that's what was found in *Davis*, because of the context in which those statements were made. And, on the other hand, in *Steinhilber*, because of the context the statements were made in *Steinhilber*, the Court affirmed a motion to dismiss, dismissing the complaint as a matter of law, concluding that, although the statements may be perceived as factual, the context in which they were made would lead a reasonable observer to conclude that they were pure opinion, including because of the heated nature of the communication.

THE COURT: Since you bring up context, isn't the

logical import of your argument that statements made in either a rap battle or diss track, therefore, are categorically opinion? Isn't that the logical conclusion of what you are saying? And is that a fair reading of New York case law that the——where the New York courts have said forum is not necessarily dispositive? But it does seem to me that you are arguing that forum, here, is dispositive; a rap diss track just can't be taken as fact.

MR. RANSOM: Your Honor, the cases that say forum is not dispositive, I don't dispute that proposition as a general proposition. It's typically raised in the context, for example, of an op-ed page or a letter to the editor, where the context would tend to suggest one of opinion, but the courts say it's not dispositive. And I suppose, in those circumstances, that it's theoretically possible that the nature of the communication, even in what is otherwise thought to be an advocacy piece with heated rhetoric, may support a finding of fact versus opinion.

Whether a diss track in a rap battle could ever cross the line from opinion into fact is an interesting question. I would submit that the nature of the art is that that is, at most, highly unlikely and may categorically be the case that it doesn't. But what we're dealing with are the facts in the case here, and what we can see and what we can look at on the facts here is that the nature of the lyrics clearly convey the sort

of rhetorical hyperbole, over-the-top trash-talking extremists that, using the language of the Court of Appeal in New York and the federal courts applying it here in the Southern District of New York, are clear and, we submit, dispositive indicia of rhetorical hyperbole and opinion rather than fact. And you can see that more pointedly in cases that are closer to this than those that offer the reservation about the forum in which the statement is made.

So, in *Hobbs v. Imus*, for example——again, affirming the grant of a motion to dismiss——the Court relies on the fact that these are shock jocks, and it's not just the limited statement in which the alleged defamatory communications are made. The Court relies upon their notorious history and the nature of shock jock journalism from these speakers in particular as supporting its conclusion, on a motion to dismiss, that the context tells you that these are statements of opinion. And it acknowledges, that if you just look at the statements taken in isolation, one could argue that they have the indicia of fact, but when you look at the shock jock context, the Court ultimately concludes the claim must be dismissed.

In *Rapaport*——

THE COURT: Again, let me press you on this. The context here is the rap diss battle, and we're here on a motion to dismiss. When I'm considering that context, don't I need to

know more about whether the ordinary listener of——and maybe there's a question as to who the ordinary listener. Is it someone who doesn't follow rap music and is just hearing it on a radio? Is it someone who's actually immersed in the community and that type of music and has that background? Those are questions that we could also discuss——but with respect to the context on a motion to dismiss, how can I say that the ordinary listener would——comparing this now to the shock jobs. Shock jobs say shocking things —— how do I, sitting here as a judge, know that the ordinary listener of a rap diss track would also have that same underlying assumption?

Isn't it true, for example, that sometimes accusations are made in rap battles that are true and turn out to be true? And maybe listeners have that understanding. And, sitting here, as a matter of law, can I say that they would not? Do I need to have more discovery——potentially experts, potentially more context, for this particular rap battle or rap battles writ large——before I can make such a judgment as a matter of law?

MR. RANSOM: There's no suggestion in any of the cases that this is the subject of, for example, expert testimony or otherwise. What the Court is required to do under the standard, as articulated in both the New York State and federal cases, is to look at the material before it and reach that determination based on its evaluation of the statements and the

surrounding context. And we can again look to an example in *Torain v. Liu*, and in *Torain v. Liu*——again, resolved on a motion to dismiss——the Court did take into account the context. And I do want to address the Court's question about whether it can look at this material at this stage because I think *Torain* is particularly probative of that point.

But the Court looks at the information and makes an assessment on its own. It did the same thing in *Rapaport*. Now, admittedly, *Rapaport* was a summary judgment motion, but it illustrates the nature of the information the Court is to consider in reaching that determination, which is the language used and the broader context in which it is provided. That's the universe of the material it looks at, and then it comes to a judgment.

THE COURT: But if the broader context——which is what we're talking about——is, perhaps, a specialized world, then perhaps the Court does need more information than is in the four corners of the complaint, and even in the request for judicial notice, to understand that context and correctly apply the legal tests. Do I have enough facts about that broader context to come to a decision about what a reasonable listener would conclude, whether or not the statements made in the song are to be taken as fact or opinion?

MR. RANSOM: Your Honor, again, what the cases do is look strictly at the material that's presented, including the

context that's provided. You do have additional information, certainly, in the form of the amicus brief that was provided in support of our motion, but also from the complaint itself. And what is interesting and notable in this case is that the complaint not only includes the allegations but it cites and references the fact of the rap battle, articles describing the rap battle, articles describing the context of the rap battle and the history between these particular artist, including the rumors, innuendo, and controversies that have surrounded Drake with respect to his relations with underage women for an extended period of time. The context is provided there.

There's no suggestion in the case law that the Court needs to limit itself to a particular type of individual, a particular type of listener, or that every listener has perfect knowledge of all the information surrounding it. That would turn an objective test into a subjective test that's dependent on individual particular listeners with very specific information, and none of the cases suggest that that is required. In fact, all of the cases that talk about this issue posit that the information is generally available and considers, with that information that is available, what would the objective listener reasonably understand.

And on the question of what the Court may consider and evaluate, again, we *loot at Torain* in particular. Here's a case where the speaker made a statement and the plaintiff

disputed whether or not the Court could consider the surrounding context, including earlier statements by the plaintiff that prompted the defendant to make the challenged remarks. In footnote 1 of the circuit opinion——it's also in footnote 1 of the district court opinion——the Court says:

"Torain, the plaintiff, contends the district court improperly considered the statements that he made during his war of words because they were not included in his complaint. That argument fails. As noted above, in determining whether a statement is actionable, the Court should look to the overall context in which the assertions were made and determine on that basis whether the reasonable listener would have believed that the challenged statements were conveying facts about the libeled plaintiff. Torain himself introduced this context in his complaint, noting that he was engaged in a war of words with a rival disc jockey."

That's exactly what we have here. Drake's complaint identifies the rap beef, identifies a number of the tracks in the rap beef, and then cites countless articles describing and discussing the rap beef and all of its context. And all of that is properly before the Court and may properly be considered by the Court in connection with a motion to dismiss. And I think what's critical is that it includes, for example, Drake's own statement in "Taylor Made Freestyle" in which he specifically said and prompted to Kendrick Lamar, referring to

himself in the third person, "*Talk about him likin young girls; that's a gift from me.*" So when Kendrick Lamar then raps, "*Hey, Drake, I hear you like 'em young*," there's no secret or surprise or mystery of the context in which that statement is made. Again, these lyrics, this context, is all properly before the Court, including because of the way the complaint is pled and the abundant references not only to the lyrics themselves and the beef itself but also to articles that provide the context to the Court that allows it to make the determination that it needs to make.

I'd like to briefly address what seems to be the primary argument that was raised by Drake, although I think not necessarily specifically raised by the Court, but in the event there's a question, there is heavy reliance on online statements made after "Not Like Us" came out, which Drake says suggests that members of the public believed that these were statements of fact rather than opinion. And this argument is wrong for so many reasons. It misstates the standard because, again, you don't look at the subjective views of individuals. It is an objective test based upon the reasonable listener. So it doesn't matter what 10 or 20 or 40 or 60 people say, because that just reflects subjective views. And that's even before you get to the substance of the reviews, which themselves reflect this rhetorical hyperbole, not to mention emojis, and misspellings, profanity, and even racism and anti-Semitic

remarks. Nothing of that informs the objective standard the Court is to apply.

Second, it ignores the fact that this exact same argument was raised and rejected in *Rapaport*, directly at the district court, where evidence was submitted of all of these statements of people, after the diss track was released by Barstool, challenging Rapaport, and Rapaport argued this shows that people thought it was fact. And the Court rejected that argument, and the Second Circuit affirmed. And it ignores Drake's own statement, Drake's own statement——which we've attached as Exhibit A to the request for judicial notice——about the pernicious danger of relying on statements in rap tracks and rap lyrics as truth, as evidence of truth, as statements of fact, about the chilling impact on this art form and the chilling impact on artists, and I don't think that can be overlooked. Drake himself took the position that you shouldn't do exactly what he's asking you to do right now. He was right then, and he is wrong now.

Finally, on defamation, Drake has also argued that this is somehow mixed opinion, suggesting that somehow Kendrick Lamar is uniquely and privately privy to undisclosed facts about Drake's sexual proclivities. I think just to say it refutes it, but, again, Drake himself goaded Kendrick with "*Talk about him likin young girls; that's a gift from me,*" *and Kendrick says, "Hey, I hear you like 'em young*," and goes from

there in "Not Like Us," no suggestion of some hidden, secret information. But, in any event, this is also an issue of law for the Court——

THE COURT: But there are lyrics that tend to suggest, as plaintiff points out, that there is information that Mr. Lamar is privy to——the reference to the rabbit holes and other truths that he can tell——that one potentially could read as suggesting that either his statements regarding Drake are based on undisclosed information or that potentially there are other secrets that he has not revealed. There's some ambiguity there, but on a motion to dismiss, I have to read the ambiguity potentially in favor of the plaintiff.

MR. RANSOM: And, again, the case law makes clear that that is also an issue of law for the Court, and that the Court is to require——is to consider context in that specific circumstance as well. We see that in *Cooper v. Templeton* and in *Steinhilber* itself where the Court says, in evaluating this question of whether there are undisclosed facts, the Court must consider the context. And so, for example, in *Woodbridge*, the Court says, "Although some of the statements are based on undisclosed, unfavorable facts known to the writer, the disgruntled tone and anonymous posting, among other things, point to opinion," and ultimately concludes, opinion rather than fact.

We also see the same thing in *Torain*, which, although

it suggested some unknown fact, the Court said, look, I look at the context as a whole, and this heated public statement tells me that, notwithstanding this trash-talking, including about putative undisclosed facts, ultimately, is one of opinion.

So, yes, when Kendrick refers to a rabbit hole, that is part of the rhetorical hyperbole throughout "Not Like Us," and the Court must consider that context in evaluating that as well. It's the same way when Drake threatens that Kendrick's darkest secrets are coming to light or that Drake dug up bones in an excavation. That context is part of the nature of the rap battle, and we see that in the amicus brief as well. It does not save Drake's claim here.

THE COURT: Let me challenge you on one specific lyric from "Not Like Us," and that's the "Certified Lover Boy? Certified pedophiles." It does suggest, particularly the use of the word "certified"——again, an ambiguous term——but paired, as it is, with "certified pedophile," it could give the listener, a reasonable listener, the impression that in some way there's been some determination that, in some unspecified official way, that Drake is a pedophile. What is your response to that argument?

MR. RANSOM: So, two things about that: First is I think it's critical, in considering that particular passage, to pair it to what proceeds it, which the Court quoted, "*Certified Lover Boy? Certified pedophiles*," referring to Drake and his

crew. The *Certified Lover Boy* is the name of a Drake album, and so it is clearly and deliberately a play on those words. And any more than the certification of lover boy status has meaning, the reference to "certified pedophile" is more of the rhetorical hyperbole that we see in this precise context. It also can't——

THE COURT: This does bring me back a little bit to my prior question, though, which is, who is the ordinary listener? Is it someone who's going to catch all of those references and all of these nuances between these two artists and the community writ large so that they're going to understand that Drake had a prior album called *Certified Lover Boy*, and this is a play on the words, or is it the ordinary listener who may not listen to either of these artists with any regularity and may not have that familiarity? Who is the ordinary listener, and how do I apply that test when there's so much specialized and nuance to a lot of these lyrics that does require in-depth analysis to catch all of those references?

MR. RANSOM: So, two things, your Honor: One, on that question, all of the cases, at least in the way they apply the law, consider the entirety of the context. They don't slice and dice it down to what a particular listener of all of the context may know and whether every listener knows every piece. In every one of these cases, what the court looks at is the context as a whole, not sliced and diced down to individual

listeners or assuming that it's limited to just people who actually have specific knowledge of particular pieces of this.

The other comment I would make with respect to the concerns regarding nuance or will someone get that is that there is a danger to that approach that is at least warned in *Brian v. Richardson*——and also in *Mann v. Abel*, another New York Court of Appeal case——about sifting through communications and picking particular words or phrases out and considering them in isolation. And what *Brian v. Richardson* says is that is dangerous to do, because rather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the overall context in which the assertions were made and determine, on that basis, whether the reasonable reader would have believed that the speaker was conveying statements of fact. We see the same thing in Mann v. Abel, another New York Court of Appeal case. Although one could sift through the article and argue that false factual assertions were made by the author, viewing the content of the article as a whole, as we must, it was protected opinion, and in that case also the claim was rejected.

So the notion of trying to look at a particular phrase, tease it out, and not take into account the broader context, the broader context of "Not Like Us" as a whole——"*Hey, Drake, I hear you like 'em young*," and Drake's statement, "*Talk*

about him likin young girls"——and then the broader context of all the rumors and innuendos and controversy surrounding Drake, young women, and girls, I believe, misses the thrust of the cases that drive the Court's decision, particularly *Brian* and *Mann*.

THE COURT: This brings me to my second question, which is the question for judicial notice, because the rumors, innuendo, etc., are not set forth in the four corners of the complaint, except, perhaps, in some of the exchanges in the song lyrics. But, obviously, the defendants have submitted articles that it wants the Court to take judicial notice of that allude to those rumors. And presumably, for the purpose under Rule 201, it's not necessarily for the truth of those rumors, but that those rumors existed and were present in the world.

MR. RANSOM: That is correct. It is not for the truth of the rumors; it is for the fact of their existence and the context that it provides with respect to the statements in "Not Like Us." But as to whether the Court can take judicial notice, the answer is, in that respect, certainly. News articles, well within the scope of judicial notice, as are song lyrics. And that is particularly true here, because of the articles that we are citing and referencing come from Drake's complaint. They are referenced in, cited in, and——some of them——discussed in Drake's complaint. Now, not necessarily the

rumors portion, but the specific articles themselves are from Drake's complaint. And we cite them, just as Drake did, and in our brief we identify——and in our request for judicial notice we identify——where from the complaint they arise.

So this is not a scenario where we are going out and finding third-party material that has not already been brought into this case by Drake in his own pleading. On the contrary, when it comes to the question of rumors and the facts giving rise to the statements that are at issue here, those are included in articles that Drake himself cites and relies upon in his complaint. So we believe the Court could properly take into account news articles under the standard RJN, request for judicial notice, standard. But, particularly in this case, where they are referenced in the complaint and cited in the complaint and relied upon by Drake, we think it's particularly appropriate and the Court is well within its authority to do so, and given the requirement that the Court consider context, we think, respectfully, that the Court is obligated to do so because that context has actually been provided——not just by us, but by Drake in his own complaint.

THE COURT: You said you also wanted to address the other causes of action. Let me give you a few minutes in which to do so.

MR. RANSOM: Thank you, your Honor. I will be brief.

We've, obviously, briefed our challenges——and there

are many——to both the Section 349 claim and the Penal Code claim. On the 349 claim, we believe that both parties' cases reflect that the information and belief form of pleading that Drake is using is improper, and that's a sufficient basis alone. But I think what's been made clear from the briefing is where that claim also and clearly fails is on the injury element. The New York Court of Appeal has clearly held that standing under 349 requires a direct rather than derivative injury. You can't have the series of steps between the alleged consumer deception and the claimed harm to Drake, and that's exactly what we have here. So many steps between the alleged consumer deception through artificially increasing the number of streams and any impact on Drake, under *City of New York v. Smokes-Spirits* in the Court of Appeal, the New York Court of Appeal, and *Frintzilas* in the Second Circuit, that claim clearly fails.

On the Penal Code claim, we have multiple arguments, but I think the easiest and first argument is there's simply no private right of action. All of the cases that Drake cites don't grapple with the *Sheehy* standard from the New York Court of Appeal, which is then rearticulated in *Ortiz*. And the existence of criminal enforcement mechanisms for that claim really eliminates the prospect of a private right of action. The cases we cite acknowledge the binding *Sheehy/Ortiz* standard. The cases that Drake cites largely don't and, in

fact, are based on authority that predates that binding New York Court of Appeals authority. So we think both the 349 and Penal Code claim should be dismissed as well.

THE COURT: Thank you very much, Mr. Ransom.

MR. RANSOM: Thank you.

THE COURT: I'll give you an opportunity to argue in rebuttal at the end. Let me hear now from plaintiff's counsel.

Mr. Gottlieb, are you going to be presenting argument on behalf of plaintiff?

MR. GOTTLIEB: Yes, your Honor.

Your Honor, I'd like to start, if I could, with a discussion about the appropriate standard of review because I think it cuts across all of UMG's arguments in this case, and it is important to have a reminder, both from the federal standard and the state standard, of why we're here today.

Under binding Second Circuit authority, the *Global Network Communications* case that we cite in our papers, a complaint may not be dismissed pursuant to Rule 12(b)(6) unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Davis v. Boeheim* is the only opinion doctrine case cited by either of the parties in this case that remotely touches on the appropriate standard of review at the pleading context for evaluating an opinion defense, and it is utterly devastating to

UMG's entire argument in this case.

As we explain on pages 1 and 7 of our brief, the question on a Rule 12 motion, when considering an opinion doctrine defense, is not what this Court thinks or what Mr. Ransom thinks a reasonable listener should have concluded when it heard the lyrics in question; the question is whether a reasonable listener "could have concluded" that the statements were conveying facts about the plaintiff. *Davis v. Boeheim* is the controlling authority. There's no other case that either party cited that even purports to interpret the standard at the pleading stage.

At page 268 of the opinion, the *Davis* court explained that, at the pleading stage, we "limit our inquiry to the legal sufficiency of plaintiff's claim without evaluating the 'sufficiency of the parties' evidence, as would happen at the summary judgment phase." *Davis* expressly argued in this case that the Court should reject the plaintiff's interpretation that were contained in the allegations in the complaint, and instead hold, using the objective standard—— which we don't dispute applies——that the reasonable reader would be likely to interpret this statement as pure opinion. The Court rejects that——and this is the most important part of the opinion——the Court says:

"On a motion to dismiss, we consider whether any reading of the complaint supports the defamation claim. Thus,

although it may well be that the challenged statements are subject to defendant's interpretation, the motion to dismiss must be denied if the communication at issue, taking the words in the ordinary meaning and context, is also susceptible to a defamatory connotation."

Meaning, if it's susceptible to a connotation that it's fact and it's susceptible to a connotation that it's opinion, the plaintiff wins at the motion to dismiss stage.

THE COURT: As I asked Mr. Ransom earlier, though, how do I square that with other Court of Appeals decisions, including *Brian*, which was also a motion to dismiss decision, in which they do not purport to overrule, so therefore remains good law, still cited by New York courts, but did not use this "could" standard, did not say "is susceptible to a defamatory connotation," but says, instead, the question is whether or not it would be understood by a listener as opinion or fact and presents it as a question of law?

MR. GOTTLIEB: So, your Honor——

THE COURT: I take you that *Davis* definitely throws a wrench in the argument, but there seems to be some tension. How do I reconcile that tension?

MR. GOTTLIEB: So, your Honor, I don't think there's tension. So, first of all, *Davis* is the subsequent and most recent opinion, so it would be controlling for this purpose. The *Brian* court doesn't purport to interpret the pleading

standard. So there was no dispute between the parties as to what the Court's inquiry ought to be in evaluating the pleadings is one point.

The second is there's no discussion or suggestion in the *Davis*——the *Brian* opinion anywhere that there was a challenge to the actual content of the allegations in the complaint, which is what we had in *Davis*, and it is what we have here, where you have the defendants essentially saying: Don't credit or believe or draw inferences from the allegations in the complaint in the plaintiff's favor; instead, accept this other evidence that we're presenting to you and draw inferences in order to determine what the appropriate social context is so you can make your decision as a matter of law.

In *Brian*, the only thing that the court considers——at least from what one can tell from reading the opinion——is the four corners of the op-ed that was being considered. The Court was merely analyzing an op-ed and talking generally about what op-eds are. There's no suggestion in *Brian* that there was an attempt to insert extrinsic evidence into the record. There's no suggestion that there was any challenge to the inferences that the plaintiff was being asked to draw of the complaint, and the *Brian* court makes clear that, in the text of the article itself, the author made clear that the purpose of the article was to advocate for an independent investigation, and in support of the argument, the defendant marshaled all of the

relevant materials included within the text of the article. So the Court had, basically, everything it needed in order to analyze both whether it was capable of a defamatory meaning, whether it can be proven true or false, and what the context immediately of the article in the broader social context were. There simply is no indication that there was any dispute before the court as to any of that.

In this case, what we have, by contrast, is an express request for judicial notice that I want to address before I get into the sufficiency of our allegations, if I could. That request for judicial notice asks the Court to accept 17 exhibits into the record and to use evidence contained in the exhibits to draw inferences that directly attack, contradict, or undermine the allegations in Drake's complaint. Now, there is a time and a place for the weighing of evidence, but that is either at trial or the Rule 56 stage. It is not here. And UMG has no answer whatsoever to the binding Second Circuit authority that we cite at page 14 of our brief, which is the *Global Network Communications* case, in which the Second Circuit makes clear that the conversion requirement of Rule 12(b) is mandatory, not discretionary. And under that rule——

THE COURT: Rule 201 allows me to take judicial notice at any stage of the proceedings. That's explicit in the rule. And, certainly, ample cases take judicial notice in the context of a motion to dismiss. That doesn't convert it to a summary

judgment motion. By definition, it doesn't, because I am permitted to consider both materials within the four corners of the complaint, matters that are incorporated by reference or that are integral to the complaint, and facts that are judicially noticed through Rule 201. And if I do, then that doesn't convert it to a summary judgment motion.

MR. GOTTLIEB: That's correct, your Honor. We don't dispute that. What we dispute is UMG's suggestion that the Court can either use the materials for either the truth of the matter asserted——which they're disclaiming here——but also can use the materials to make factual inferences based on the content of what the Court finds within those exhibits.

THE COURT: Well, let's just talk about the song lyrics in the rap battle. There's an argument that they're already incorporated by reference——except, perhaps, one, the "Taylor Made Freestyle," which was notably omitted in the amended complaint by reference——but the others, the other songs in the rap battle, are referenced and linked to their Spotify or——I think it was their Spotify listing. So I'm not even sure that I need to take judicial reference that they're not incorporated by reference into the complaint, but certainly there can't be dispute about what the lyrics are. The lyrics are what they are.

MR. GOTTLIEB: So, to make this easy, we don't challenge that the Court can take notice of the fact that

lyrics exist in a song out in the world. The question is how one interprets those lyrics and what meaning is given to those lyrics in the context of evaluating the rap battle. Similarly, of course, we don't challenge that there was a rap battle. We plead that in our complaint. What we take issue with is UMG using lyrics to draw inferences about what reasonable listeners and reasonable viewers would have understood about the song in question. That is where the argument strays from what is permissible under the Court's judicial notice authority, and it also strays——

THE COURT: Once the lyrics are in evidence, then, of course, I can draw inferences from them. They're in evidence. They've been judicially noticed. The lyrics exist. They have the meaning that they have. They're words. And I don't understand your argument that I could take judicial notice of a song lyric, but I'm not allowed to consider what the lyric means or says.

MR. GOTTLIEB: Because, at the pleading stage, the Court is not allowed to make inferences against the plaintiff. The Court is required to draw all reasonable factual inferences in plaintiff's favor, and the Court's not allowed to take materials from outside of the complaint and use it to discredit or undermine or question the allegations that have been plausibly alleged in the complaint. And I think this argument around context is——this is an important example. So, for

example, we have alleged throughout the complaint what the appropriate context for the understanding of the lyrics, the cover art, the video, and the song are. We have alleged that the full context includes the lyrics of the song, the cover art, and the video, and we have explained, in numerous allegations throughout, why a reasonable listener or reader or observer would have interpreted those songs as conveying a singular and precise factual message that Drake——and false message——that Drake is a pedophile.

THE COURT: But isn't that a legal argument, that I don't have to draw an inference in your favor? Because whether a reasonable listener would have drawn that inference is a question of law, which you've already agreed is a question of law, and legal assertions or arguments made in a pleading do not have to be credited by the Court.

MR. GOTTLIEB: The question, though, is not what a reasonable listener would have interpreted the lyrics to mean; the question is whether a reasonable listener could have interpreted the lyrics to mean——in other words, is it reasonably susceptible to a defamatory connotation? That's the *Davis* standard, and we think that we have more than adequately alleged that.

But, more to the point, we have specific factual allegations in the complaint that UMG engaged in a coordinated, covert, and unlawful scheme to remove "Not Like Us" from the

rap subgenre and turn into a *de facto* national anthem. That's alleged at paragraphs 10 and 11 and 128 through 202 of our complaint. The complaint alleges facts showing that UMG wanted to and succeeded in making the song culturally ubiquitous. And this means that the audience——to answer one of the Court's questions to my friend——the audience by which to evaluate defamatory meaning in this case is not the people who would be dialed in to every back-and-forth between Kendrick Lamar and Drake in the rap battle, but the audience is everyone exposed to the lyrics and imagery, not just those sort of there in the moment. We cite the *Lindell v. Mail Media* case in the Second Circuit that stands for that proposition.

This is particularly important because we also allege, with specific numbers, that this song achieved a cultural ubiquity unlike any other hip-hop song in history, not just unlike the other songs in the rap battle, but unlike any other song in history. More than 9 billion streams at the time of the filing of our last brief have been——9 billion times have been streamed on this song. Every other track in this rap battle pales in comparison to that. So the relevant audience member, if the Court is trying to understand the objective listener, objective viewer, cannot be the person who listened to every single track in the rap battle. The relevant person is probably your average 13-year-old who's alleged to be dancing to the song at a bar mitzvah, who may not have heard

any of these other songs before or may not even be that much of a rap fan.

THE COURT: That would be a very interesting bar mitzvah that played that song.

MR. GOTTLIEB: That is apparently very popular at bar mitzvahs, your Honor.

THE COURT: I'll take your word for it.

MR. GOTTLIEB: There's a separate set of factual allegations in the complaint that add to this that UMG also doesn't add, and that's contained at paragraphs 90 through 92 of the complaint. We alleged that, in sort of the modern social media environment, allegations of pedophilia are of the far more relevant social context, and whatever might have been true when Judge Daniels with considering these issues in *Torain*, today, given the massive global audience for this song——that it reached the entire world——and the social media environment in which allegations of pedophilia land, today, audiences are simultaneously primed to believe and primed to react with outrage to allegations of harming children. And that is a direct response to many of the generalizations contained in the cases that UMG cites and many of the arguments they're making. These are specific allegations at paragraphs 90 to 92 of our complaint.

UMG is asking you, based on their sort of own spin of exhibits, to disregard these well-pleaded factual allegations

in the complaint about how——how sort of the world today receives these type of allegations, and we just don't think that can possibly be appropriate at the motion to dismiss phase.

THE COURT: Let me go back, because we were addressing the various inferences that can be drawn from the lyrics, and one question I have for you is, do I have to draw an inference from the lyrics? Don't they speak plainly? So, for example, let's go back to the Taylor Freestyle lyric, which is, "*Talk about him likin young girls; that's a gift from me*," and in the context, with the AI voice of Tupac, it's clearly——one can clearly read it to be a goad from Drake to Kendrick, as part of their back-and-forth in the rap battle, to bring up rumors regarding pedophilia and Drake. I don't know how else one could logically read that. If you have an alternate reading, I'd like to hear it. But I don't think I have to draw an extreme inference to understand what that line is.

MR. GOTTLIEB: Well, your Honor——

THE COURT: What would be the inference that would be favorable to plaintiff of that line, other than the one that I've just put forward?

MR. GOTTLIEB: Because, your Honor, you would have to consider, as Mr. Ransom says, black-letter law and opinion doctrine, you don't slice out a single line or a single statement from a song in order to ascertain its meaning. You

consider the entire song and the entire lyrics in context.

THE COURT: But I'm asking you about this line in this song. How would I read it? You said I can't draw inferences from these song lyrics; I can just consider their existence. But do I have to draw an inference?

MR. GOTTLIEB: Yes, you ——

THE COURT: The words are the words. "*Talk about him likin young girls*," how else would I read that?

MR. GOTTLIEB: Your Honor, I don't understand what legal relevance that has to the question of how a reasonable audience member would have understood the lyrics in "Not Like Us." Before you even get to talking about the lyrics in his prior song, you would have to come to the conclusion that your average listener to "Not Like Us" came into the song with that lyric in mind, had heard that song, had been exposed to it, had understood the lyrics in the same way that your Honor is reading them, and there's simply no basis on which to make that determination at the pleading stage in this case. They may come forward with evidence——

THE COURT: Let me have you pause there. I understand that a lot of these cases arise in a very traditional context of a newspaper article or an op-ed or a single communication, but, here, we have songs that are in communication with each other, a dialogue with one another. One artist releases a song, a few hours later another song is released that responds

to that song, and back and forth. That is the context in which these lyrics arise.

So to take "Not Like Us" as the specific example and just to isolate it, isn't that taking it out of the broader context in which it existed? It would almost be like taking a single paragraph out of an op-ed and not looking at the headlines and the remainder of the article. Because you can't look at "Not Like Us" in isolation. It's a response to what's come before.

MR. GOTTLIEB: So, your Honor, we're not advocating for the Court to not consider the context, that this song was the penultimate track in a rap battle. That's not our argument. Our argument is this song in particular, both in this rap battle and in the history of music, is different. It is different in ubiquity it achieved, so its audience was different. It was different in the fact that it was immediately understood, in the allegations of our complaint, to contain a precise factual allegation and a single factual allegation, the false allegation that Drake is a pedophile. We allege——

THE COURT: At the time Kendrick Lamar released this song, there was no ubiquity, and there was——obviously, he's not a fortune teller. He wasn't going to understand that, at the moment that he released this song, it was going to have eight, 9 billion streams, and he would be singing it at the Super

Bowl. He was releasing it as part of this back and forth that occurred over the matter of days. And isn't that the context in which I need to understand the assertions made, not six months later that millions and billions of people have now listened to it and may not have that understanding, but at the time the statement was made, it was in direct response?

And let me give you a hypothetical. If two people are arguing on the street and throwing insults back and forth, and then later on one of them says, "OK. That particular statement was slander. You've defamed me," I'd have to know what the interchange between those two individuals were that were throwing insults to understand the full context in which whatever statement was made.

Isn't that comparable here: someone insults, the other person responds with further insults, the other person responds with other insults? How can I just take one of these songs in isolation and apply a completely different standard to it because three months later billions of people have now listened to it?

MR. GOTTLIEB: Your Honor, I appreciate the question. I think it stems from a lack of grappling with the——and perhaps due to imprecise briefing on our part——the nature——the role that republication plays in this case. We have alleged in our complaint, I believe in 11 separate paragraphs in the amended complaint, that UMG was responsible for republication of the

defamatory material. That's paragraphs 13, 21, 120, 121, 157, 191, 192, 232, 241, 246, and 266. The standard for republication is that a defamatory statement is republished whenever it is intended to and actually reaches a new audience. That's the New York Court of Appeals decision in *Firth v. State*.

We allege this throughout our complaint. UMG said nothing about it until their reply brief in this case. So we have alleged that UMG took steps at multiple times post-May to republish the material and introduce it to new audiences, and each time it did that, it was liable for that republication. And each time it did that, its knowledge at that point in time becomes relevant. And we have pleaded that knowledge in the complaint, including what it knew in July, what it knew in August based on retraction demand letters that we sent to it, what it knew when it launched the Grammy's campaign, what it knew when it launched the Super Bowl campaign.

But, even if you don't agree with us on that, we allege in the complaint, before you get to republication, that the defamatory material includes the song, the cover art——both of which were released on May 4——and the video, and the video was not released until July, two months after the release of the song. And UMG's knowledge at the time that it released the video included all of the information that we have alleged in the complaint, including the attacks on Drake's home in

Toronto——three separate attacks on his home in Toronto——the attack on his OVO business in London, the fact that users all over the United States were commenting on him being a pedophile, and the fact that Drake had denied, factually, the allegations in "The Heart Part 6." We make all of those allegations in the complaint about UMG's knowledge at the time of the publication of the video, so that's the latest point——that's the earliest or latest. But their knowledge, clearly, at the July point in time, before you even start talking about liability for republication, comes into play.

And then, your Honor, with respect to your question before about sort of removing the song from the factual context of the battle and doesn't it sort of have to be understood that way, we have alleged that this song was actually understood as a sort of singular entity because of its cultural ubiquity, and even the exhibits that UMG has put into its requests for judicial notice, they prove this. So, for example, UMG has Exhibit P, which is a podcast transcript that we cite a piece of in the amended complaint. At pages 4——page 4 of that podcast transcript, there is a discussion about how Kendrick is making allegations about Drake: "Some of these things have been fact-checked." And then later on down, one of the commentators says: "I don't know if there's ever been a time when a rap superstar——or two rap superstars are contemporaries and one is accusing the other of pedophilia, like, in the

loudest possible way." It continues, "Contemporaries, people who are making their record label billions of dollars, right, that doesn't usually happen, and this level of allegation——maybe it should inspire some sort of investigation."

Later, on page 5, it says that——one of the commentators says, "It unclear right now if the claims of Kendrick Lamar's domestic abuse are true, but let's talk more about these allegations around Drake. No one has previously called out Drake in this way. Now it's being raised to a more mainstream conversation because it's a hit that Kendrick is making."

Your Honor, Exhibit B to UMG's request for judicial notice, page 10, the commentators describe Kendrick Lamar in this song as "indicting Drake for years of rumors and speculation." "Indicting," meaning a specific factual charge being made in a song based on rumors and speculation. Notably, "Not Like Us" doesn't include the rumors and speculation in it. It doesn't talk about any of the underlying rumors that Mr. Ransom was talking about that Drake allegedly had to deal with in his past. It only includes the indictment——the specific charge that he is a certified pedophile——the cover art, which is his actual Toronto home, which, by the way, is also validated by the other exhibit that UMG wants you to take notice of, Exhibit J. Page 4 describes the content of the song

as "Sex Offense Allegation: "Throughout 'Not Like Us,' Kendrick accuses Drake of having inappropriate sexual relationships with minors. This is also a topic Drake has had to debunk in the past. However, Kendrick doesn't shy away from blowing up the rumors surrounding Drake's personal life with his lyrics."

Later down, the predator accusations include the cover art for the track; in fact, an aerial picture of Drake's mansion, allegedly dotted with sex offender location tags. These are their exhibits from commentators interpretating the lyrics of the song contemporaneously, understanding it with a precise meaning that can be fact-checked, that can be proven true or false. So if these things are in the record, we're fine with it, because they all prove that there is a susceptible connotation that can be drawn that the song had a precise meaning.

Your Honor, I don't know if the Court——

THE COURT: Let me ask you this, though: Your client also in the course of this rap battle leveled accusations against Mr. Lamar as well: That he's not the biological father of his child; that he beats his girlfriend. Are those facts or opinion?

MR. GOTTLIEB: Are those——I'm sorry, your Honor?

THE COURT: Are they fact or opinion, those lyrics?

MR. GOTTLIEB: I don't know that the Court has a

record sufficient to be able to make that determination because the Court doesn't have the context behind all the different allegations in the song. There isn't a complaint with 250 allegations giving meaning to the lyrics. We don't know, was there cover art? We don't know, was there a video? We don't know, was there a singular message? We don't know how people understood it.

So that is both a determination that the Court doesn't need to make here, nor is there one that the Court has a record to make here. That could be the subject of questions that, I imagine, UMG will want to get into in discovery in this case, but it is certainly not a reason to find that the pleadings fail to state a claim on which relief can be granted.

I don't know if the Court wants me to address the actual malice arguments that have been made.

THE COURT: I do not need to hear arguments on the actual malice.

MR. GOTTLIEB: OK.

THE COURT: If you would like to briefly address the other two causes of action in the complaint, however.

MR. GOTTLIEB: Sure. So with respect to the——with respect to the Section 349 claim, your Honor, Mr. Ransom made essentially two arguments. The first is he made an argument about information and belief pleading, and the second is about the injury element. So let me address the information and

belief pleading.

I think this argument just simply misunderstands the nature of the allegations that we make in the complaint, and so we don't think it actually matters whether the Court concludes what the standard on information and belief pleading is. Even under the standard that UMG articulates, we believe our allegations meet that for purposes of Section 349. So we essentially made four arguments that support the underpinning factual allegations of materiality and consumer harm under Section 349. The first argument we've made is that UMG misled streaming consumers by paying or by causing payments to be made to third parties to have bots artificially stream the recording on Spotify to boost streaming numbers, and that's paragraphs 173 to 178 of the amended complaint.

Now, UMG says that this is based on information and belief, but the standard here is plausibility under *Iqbal* and *Twombly*. And we more than meet that standard for the following reasons: So, under paragraph 174, we allege that fake streams are a huge problem in the music industry, and that UMG hasn't disputed that up to 10 percent of all music streams are false. And in 2021 alone, 1 to 3 billion fake streams across popular music platforms were fraudulent.

If that's the only allegation we have, we agree, we'd be in a bad place on information and belief pleading. But we continue that, in paragraph 175, fake and manipulated streams

are significant problems for Spotify, which invests heavily in their reviews on it. It is a reasonable inference that Spotify would not make heavy investments in a nonexisting problem. We also allege that "Not Like Us" set records on numerous streaming platforms. It was the fastest song ever to reach 300 million Spotify streams in just 35 days, which is paragraph 130. And one possible inference of this which we believe the Court must draw at this stage is that this unprecedented rocketing up the streaming chart that UMG was using a technique that is evidently used on 10 percent of all music streams to manipulate stream totals.

Now, UMG does not dispute any of the paragraphs from paragraphs 129 to 171, addressing its completely unusual and unprecedented tactics in promoting the popularity of "Not Like Us." That includes things like whitelisting agreements with other parties. All of those allegations I just referenced are the background for the pleadings——for the allegations that UMG describes as "information and belief."

That background supplies the context for paragraphs 176 to 178, which are based on three things: One, a popular podcast host who insists that he knew that "Not Like Us" used bots; second are users on social media claiming to be music industry whistleblowers who witnessed the buying of promotion through a digital marketer; and, third, a self-proclaimed retired stream farmer who posted a video in

which he claimed to show how a streaming bot had UMG and Kendrick Lamar used to boost "Not Like Us" streams in their beef with Drake. These are individuals who purport to have firsthand knowledge. They're included in our complaint, and they are all consistent with the underlying and background allegations that precede it. This is an entirely appropriate allegation on information and belief.

And under the authority that we've cited, these are particularly appropriate information-and-belief allegations when you're dealing with a covert scheme where, in order to complete our proof of the claim, we rely upon evidence that is in the possession of the defendant. That is in the authority that we cited, which also cites cases from the Second Circuit on this point.

We make three other arguments on this that I'll only mention very briefly. The second is that UMG provided financial incentives to streaming platforms to promote the recording and recommendations playlist and search results, and in particular this is important because it relates to the injury argument, which I'm about to get to. We allege that UMG charged lower than usual license rates in order for Spotify to recommend "Not Like Us." And we allege in paragraphs 180 and 183 numerous examples of users who described searching for other music, including searching for Drake's music, and being directed to "Not Like Us," both on the Spotify platform and on

the Apple platform, and that's quite important in the injury allegation.

The last two allegations in this are the pay-for-play Payola allegations at paragraphs 184 to 188 of the complaint and the misleading statements that UMG made about the recording, streaming, and radio successes, while knowing that such success was inflated by its deceptive scheme, and that's paragraphs 130, 154 to 155, and 257 of the amended complaint. All of that is entirely appropriate under any pleading standard when considered in context.

The second argument that Mr. Ransom made was about the injury element. Mr. Ransom argues that the injury is too attenuated; there are too many steps in between Drake suffering harm and the alleged harm to consumers. That's simply not the case. So, as I just explained, as we've alleged in paragraphs 180 and 183, the scheme that we have alleged misdirected consumers away from Drake's music as a result of manipulation of the search functions on Spotify and Apple, and the result is that consumers were misled into streaming "Not Like Us" rather than Drake's music. We have also alleged that this caused direct financial harm to Drake, not indirect financial harm to Drake, in paragraph 229 of the complaint, where we explain that reduced streaming rates translates into reduced royalties.

So before you get to any argument about——

THE COURT: Can you just explain to me——and I'll express some ignorance as to how whatever algorithm applies to Apple Music and Spotify work——but how is this either the streaming bots or the pay-for-play related to the notion that if one went on to Spotify and tried to play Drake's music, you'd be redirected to "Not Like Us"? The connection between those two things is not entirely clear to me, and perhaps it's because of my lack of familiarity with how those platforms work.

MR. GOTTLIEB: So the streaming and bot farm is distinct from that claim, your Honor. So the streaming and——the streaming fraud allegation was sort of the first set of allegations I listed out. The payment of financial incentives to promote the recording and recommendations in playlists and in search results was the second. Those are contained in separate allegations in the complaint. And the allegation there is that——

THE COURT: So then what is the injury with respect to the bot-streaming allegations? What would Drake's injury be?

MR. GOTTLIEB: The injury in bot streaming is there is a dilution argument, and there is a sort of streaming-to-get-streaming argument. So the dilution argument is the larger the number of fake streams that exist in the platform, the lower the royalty rate that goes to artists that are not involved in streaming.

THE COURT: So what you're saying is every single artist on Spotify would have this exact same cause of action against UMG?

MR. GOTTLIEB: Yes. And that's entirely consistent with Section 349. In the Northern Auto Mart——*Autobahn* case that we cite in our papers, along——there's two cases that we cite in our papers on the injury requirement, recognizing that by giving——"any person" is the language of Section 349——by giving any person who is aggrieved by an injury to a consumer standing under Section 349, there's potentially a large number of businesses, particularly in competitive situations, that can bring claims. But those——but the court has held that that was the intent of Section 349.

If you give me one minute, your Honor, I'll get the case so I make sure I cite it correctly.

THE COURT: Sure.

MR. GOTTLIEB: It's the *North Shore Autobahn v. Progressive Insurance Group* case from 2012. And it explains in the section on direct injury how the statute allows for any person to bring a claim, and the question is whether the business that is asserting the claim suffered an injury as a result of the consumer deception. The claim in the *North Shore Autobahn* case, as well as in the *M.V.B. Collision* case that we cite, was essentially that consumers had been deceived or misled by insurance companies in a scheme to take their

business to other businesses that happened to be competitors. And as a result of those consumers being misled to go to other businesses, North Shore Autobahn suffered harm as a result of having fewer——sort of less foot traffic or less traffic into its business. That's essentially the argument that we're making here. When consumers were misled into——consumers are misled into listening to a song when they're searching for Drake's music, he is injured both directly, but then he's also injured as a result of dilution, because of less compensation that occurs in the formula from Spotify for its artists.

Your Honor, with respect to civil harassment, we can rest on our papers and the authorities cited therein, unless the Court has questions for me.

THE COURT: That would be great. Thank you.

Mr. Ransom, I'll give you a brief period for rebuttal.

MR. RANSOM: Thank you very much, your Honor. I will endeavor to be brief. I'm sure you will hold me to it.

Let me start, if I could, with Exhibits B, J, and P to our request for judicial notice. Those, again, are articles that are cited in Drake's complaint. And if I heard Mr. Gottlieb correctly, after discussing them, he said these things in the record: "If the Court wants to consider them"——I think this is a quote——"we're fine with it." So I believe that addresses, in large part, one of the Court's first questions as to whether and how it can consider these materials that have

been submitted. I believe he said the same as to the song lyrics.

When I look, for example, at Exhibit P and I think about Mr. Gottlieb's characterization of it, I think it also resonates with the Court's comments that if the Court has these materials in front of it, it can look at them and can look at the entirety of them. So Mr. Gottlieb invoked in Exhibit P the statement, "and some of these things have been fact-checked," suggesting that tended to convey a finding of fact versus opinion. That——

THE COURT: Page 4 of Exhibit P?

MR. RANSOM: This is page 4 of Exhibit P. And he quoted solely the portion that some of these things have been fact-checked. He failed to read the rest. This illustrates why context is so important. It says: "And some of these things have been fact-checked, like Baka Not Nice, who's a rapper in Drake's crew who was convicted of assaulting a young woman and who was accused of running a prostitution ring." That's the fact-check reference.

He also overlooks the fact that this article, which they're fine with the Court considering, in talking about Drake and in talking about the references in "Not Like Us," say things like, these are the speakers' quote: "We all know the stories of him going to girls' basketball games, and it's in our faces. Let's talk more about these allegations"——that's on

page 4 and page 5: "Let's talk more about these allegations around Drake. Tirhakah, as you mentioned, there are some things we've seen and heard over the years," and then it refers to the discussion——or the history with Millie Bobby Brown and her relationship with Drake when she was 13 and he was 30 or 31. So these articles provide the context that the Court can and should consider in our motion to dismiss.

So true with respect to the lyrics. And, again, the Court asked the question about "Taylor Made Freestyle," and you're right, it is conspicuous that "Taylor Made Freestyle" is not included in the footnote in Drake's complaint, but it is referenced in these articles that Drake is fine with the Court considering, and there's no real question that it's part of the battle. And, again, I think it speaks to the question of context. Because, yes, I focus on the line "*Talk about him likin young girls*; that's a gift from me" from Drake, but the context of that is not even limited to that line. And your Honor, I'm going to read it verbatim. Please excuse the profanity. This is the entirety of the statement from Drake:

"*Kendrick, we need ya, the West Coast savior, engraving your name in some hip-hop history. If you deal with this viciously, you seem a little nervous about all the publicity. Fuck this Canadian light-skin, Dot. We need a no-debated West Coast victory, man. Call him a bitch for me. Talk about him likin young girls; that's a gift from me.*"

That's the context in which "Not Like Us" appears. That's the background, that's the history, and that's what clearly conveys this rhetorical hyperbole that what you hear in these rap battles is trash-talking in the extreme and is not and should not be treated as statements of fact.

Very briefly, your Honor, Mr. Gottlieb says there's no indication of a dispute in *Brian* as to the context or connotation of the statements. *Brian* is a New York Court of Appeals decision. I'm pretty confident there was a dispute in *Brian*. And if the Court looks at it, the Court reflects that the parties vigorously disputed all issues, but that context was key and that the motion to dismiss was properly granted.

Mr. Gottlieb also invokes *Global Networks*, which is in their brief, albeit not for the point that he cites, and with good reason. On the pleading standard, motion to dismiss standard, *Global Networks* was effectively overruled by *Twombly* and *Iqbal*. So it doesn't actually state the correct standard.

Very briefly on the Section 349 claim, I think what the discussion with counsel illustrates is the fundamentally indirect nature of any injury or harm that Drake claims. It requires consumers doing a thing, Spotify doing a thing, royalty streams doing a thing——multiple steps, and that is not what 349 is intended for. It is not intended to permit any person who claims——in this case as Drake does——that they were effectively indirectly impacted by some purported consumer

deception to bring a claim. That would, frankly, flood and overwhelm the courts in a way that is unsupported by the Court of Appeals requirement that the injury be both tangible, nonspeculative, and direct.

THE COURT: Thank you very much.

MR. RANSOM: Unless the Court has questions, I will rest.

THE COURT: Thank you very much, counsel, for your arguments today. They were very helpful.

The Court is going to request that the parties order the transcript and split the cost among them. I'm going to reserve decision on the motion to dismiss, so an opinion will ultimately follow.

Are there any other issues that the Court needs to take up today?

MR. GOTTLIEB: None for plaintiff, your Honor.

MR. RANSOM: No, your Honor.

THE COURT: Thank you very much. Court is adjourned.

(Adjourned)